

MINUTES
(Subject to approval by the Committee)
Public Defense Reform Interim Committee
Monday, November 24, 2014
8:00 A.M.
WW53, State Capitol
Boise, Idaho

Co-chair Darrell Bolz called the meeting to order at 8:03 a.m. and requested a silent roll call. He recognized Representative Carolyn Meline who was participating via telephone. Members present were: Co-chairs Senator Todd Lakey and Representative Darrell Bolz; Senators Curt McKenzie, Dean Mortimer, Jim Guthrie, and Cherie Buckner-Webb; Representatives Lynn Luker, Christy Perry, Janet Trujillo, and Carolyn Meline (by phone). Legislative Services Office (LSO) staff members present were: Ryan Bush, Jared Hoskins and Charmi Arregui.

Others in attendance: Justin Ruen, Association of Idaho Cities; Walter Odedo, University of Idaho; Ian Thomson, Public Defense Commission; Barry Wood, Idaho Supreme Court and Court of Appeals; Dan Chadwick and Dan Blocksom, Idaho Association of Counties; Sara Thomas, State Appellate Public Defender's Office; Marilyn Paul, Twin Falls County Public Defender; Seth Grigg, Association of Idaho Counties; Alan Trimming, Ada County Public Defender; Lorna Jorgensen, Ada County; Kathy Griesmyer, American Civil Liberties Union (ACLU) of Idaho; Stacey Beaumont, Concordia University; William Wellman, Public Defense Commission.

NOTE: Copies of most presentations, handouts, reference materials, and public testimony can be found at: www.legislature.idaho.gov and are also on file at the Legislative Services Office.

Co-chair Bolz noted that this was the last meeting of the Public Defense Reform Interim Committee. Whether it continues in future years is unknown, but the Speaker of the House wanted everything finished this year. A number of issues need to be resolved, and decisions can no longer be put off. The committee needs to decide to do something or make recommendations and let the Public Defense Commission (PDC) make those decisions. He advised the committee to be aware that any legislation dealing with public defenders will either have to come from the legislators on the PDC, members of the interim committee, or members of the House or Senate Judiciary and Rules committees. Co-chair Bolz also advised that as of December 1, two members, Co-chair Bolz and Representative Meline will no longer be legislators and would no longer be able to sponsor legislation; they could, however, provide testimony, if necessary. Co-chair Bolz advised the committee there would be two presentations followed by discussions of potential legislation.

Co-chair Bolz asked for approval of the October 28, 2014 minutes. Senator Mortimer moved for approval. There was no second. The motion passed unanimously by voice vote.

Co-chair Bolz welcomed Seth Grigg, Executive Director, Association of Idaho Cities (AIC). Mr. Grigg stated his presentation would include feedback from questions asked in committee meetings regarding what cities are doing, the positions of the cities, and the impact on the cities. He added that his presentation was covered in the memo portion of his handout, but the focus would be on Appendices A and B. Mr. Grigg explained the role of the city in the public safety system in the state of Idaho, particularly prosecuting misdemeanors. By statute, cities are required to prosecute all city code misdemeanors and infractions, as well as state misdemeanors and infractions that are cited by a city officer and occurring within the confines of the city. Roughly 60 percent of all misdemeanors are cited by a city officer and most are for state code violations because more than 60 percent of the state's population is within a city and everyone else tends to travel through the city for work or commerce. Mr. Grigg stated that cities are unique in how prosecutorial and law enforcement services are funded. Cities do not have dedicated property tax levies. In contrast, counties have justice levies that allow them to collect property taxes to fund justice related services; therefore, cities often rely

on general fund property tax dollars used to fund general fund operations of the city to pay for law enforcement services. Mr. Grigg stated that cities receive 90 percent (after courts costs) of fine revenues from tickets for city code violations, state traffic infractions, and certain state misdemeanors typically related to traffic codes. He added that offenders pay high costs as well when crimes are committed including the fine and possibly an additional \$200-\$400. Offenders do not always pay those costs resulting in waived fines; therefore, the fine is waived and becomes a debt to the state.

Mr. Grigg stated fine revenue is one of the primary sources of funding prosecutorial services at the city level. Fifty cities responded to a survey where it was determined that fine revenues in FY2014 were \$3.2 million; almost \$4.3 million is being paid out in prosecutorial expenses which does not include other costs in providing law enforcement. Mr. Grigg stated that the deficit needs to come from property tax dollars. Senator Mortimer asked if defense is included in the prosecutorial expenses. Mr. Grigg responded "no" because cities are not required to pay public defender costs. Mr. Grigg added that the challenge is trying to assess what percentage of misdemeanors are for state code violations as opposed to city code violations. The data has been difficult to extract, and the AIC has asked the courts and the cities for that data. He stated 45 cities have responded and roughly 28,800 citations have been issued, which is about half of what was reported by the courts; however, it is unknown if there are multiple charges on one citation for one person. AIC is assuming they are individual charges. Mr. Grigg stated that almost 1,900 of the citations were for city violations as opposed to state misdemeanor violations. Coeur d'Alene and Twin Falls were able to identify how many of those citations required a public defender. Coeur d'Alene issued 209 misdemeanor violations, 23 requiring a public defender. Twin Falls had similar numbers.

Mr. Grigg stated that the data shows a disparity across the state. The disparity, in comparison to a felony charge or state misdemeanor, is due to many of the city misdemeanors being civil rather than criminal. He added that a public defender is not required for planning and zoning or building code violations because the individual does not meet the threshold for a public defender and is typically able to pay for legal counsel. Also there are instances where a ticket is written for a table misdemeanor, no jail time, and just a transaction cost is imposed. The AIC found that some cities have not reclassified their animal enforcement penalties. For example, the penalty for a dog at large or barking dog is a misdemeanor now, but should be classified as an infraction. Another issue is that a number of cities have adopted the state traffic code as city code; therefore, tickets were written as city code violations instead of state violations. AIC has been working with cities to make sure the cities repeal the state traffic code because it's redundant. For example, Rexburg adopted the entire state criminal code by ordinance and tickets were written as city code violations, even for state misdemeanors, and 100 percent of Rexburg's tickets were for city ordinance violations. An AG opinion in the 1990s validated that practice, but the AIC believes reclassification efforts should be made. Prior to 1990s, cities and counties did not have infraction authority. Tickets written for city or county code violations were written as misdemeanors because infractions did not exist in the state of Idaho. If jurisdictions have not revisited penalty provisions of their city code since the 1990s, it is likely the penalties are for misdemeanors as opposed to infractions. Mr. Grigg stated that the AIC strongly supports misdemeanor reclassification efforts, and a misdemeanor reclassification subcommittee was created by the Criminal Justice Commission which included city representatives. Mr. Grigg stated that city law enforcement officers are aware of this when writing citations and are advocates of reclassification. For example, a minor in possession would be cited for a misdemeanor. That misdemeanor would follow them forever and could have a negative impact with regard to employment and housing, etc. Cities are engaged in reclassifying, and AIC staff is working with and providing tools to the cities. Mr. Grigg stated that some cities are considering a tiered escalated system where the first offense is an infraction and the second a misdemeanor.

Mr. Grigg noted that there are concerns with creating a city-based public defender system. One concern is that by adding 200 cities to the public defense system, it would be structurally inefficient. The requirement of cities to contract with public defenders would bring significant liability to the

city and would be too costly for smaller jurisdictions that issue two to three citations per year. He stated that another concern is citations including a state misdemeanor and city code violation. It is duplicative to have a public defender for the state misdemeanor and another for the city code violation, when a single public defender could handle both and would be more cost effective. The overall funding would also be an issue. He stated that, for budgetary reasons, city officers would have to weigh whether or not to write a ticket, considering the impact on public safety. The funding would come out of the city's general fund which would cause cuts to other programs and services already provided. Mr. Grigg stated that cities do not have property tax levies for justice related services; therefore, a mechanism to raise revenues would be needed. Mr. Grigg stated that the best, most efficient, and most constitutional system would be one that is funded and managed by the state. He stated that the counties, with support from the AIC, have submitted a resolution for a state-funded system.

Mr. Grigg stated that he had heard comments about a lack of checks and balances, where cities can write as many tickets as they want without having to bear any of the costs of writing those tickets. They receive the fine revenue without having to worry about what impact that has on the county, the state, and other systems. As demonstrated earlier, the cost of prosecuting is not a money maker or source of revenue because the cost of prosecuting outweighs the fines received from those tickets. Additionally, Idaho law allows the county to charge the city for housing their misdemeanors in the county jail. Cities may be required by the county to pay for any city inmates for misdemeanor violations that are housed within the county jail which could be \$40-\$60 per day to house those individuals.

Mr. Grigg stated that the most immediate thing cities can do is to take a look at their codes. County and state code violations that are reclassified should have a significant impact on the overall need for a public defender for minor crimes. Cities that reclassify their city ordinance violations will help to reduce these costs. AIC is committed to continuing to work with cities and the committee on reclassification efforts and do any research needed, working with folks to help bring those costs down. He asked the committee to take his presentation into consideration moving forward with any system that might be imposed.

Representative Luker asked why cities were mirroring state laws. Mr. Grigg stated that how fine revenues are distributed is misunderstood. If a ticket is written for a city offense, 90 percent of the fine is revenue. In some instances, it's believed that state traffic violations had to be written as city ordinance violations to get the fine revenue. In reality, the distribution is the same whether it is a state traffic infraction or a misdemeanor related to state traffic code.

Co-chair Lakey stated that the numbers discussed are very small, one to four percent, even under the existing approach where misdemeanors have not been reclassified. If cities reclassify, the number of misdemeanors would go down even more; therefore, the amount cities would pay would be small. Mr. Grigg agreed it was possible. The AIC does not have data for some of the larger cities. He assumed that the smaller jurisdictions would reclassify where possible and, where not possible, they would have to make the determination whether to even charge for a misdemeanor. Larger jurisdictions may potentially have 1,000+ people, which could be a considerable cost and, without additional resources, cuts would have to be made. Mr. Grigg asked the Committee to consider the potential impact and risk to public safety by inhibiting officers from writing a ticket because of costs.

Senator Guthrie stated that funding to the county for prosecution and court costs would be reduced if the city paid for public defenders. He asked how elective the ability was to reduce costs, and would counties be required to pay if cities did not have a police department. Senator Guthrie also asked Mr. Grigg to expand on his statement about reducing costs to the courts. Mr. Grigg responded that cities often have a contract with the county to provide those services, but short of that contract or creating a law enforcement entity at the local level, the city would not be able to service those individuals within the city. Many cities have agreements with counties to pay for magistrate courts

costs. He stated there are a few cases being litigated in Ada County on what that amount should be. Cities will have to decide where to cut those services to pay for the public defenders. In some smaller counties, cities pay the county for prosecutorial services.

Co-chair Bolz asked Mr. Grigg how many cities are paying to house inmates. Mr. Grigg stated he did not have that data for larger jurisdictions, but smaller jurisdictions typically do not pay to house inmates. He stated that he was not aware of any city jails in the state of Idaho and that it was very costly to run a jail.

Co-chair Lakey asked how many people charged with misdemeanors end up serving jail time. Mr. Grigg stated he did not have that data. He stated that it mostly depends on what cities have adopted within their city codes. There are more cases of jail time served in cities that have mirrored state code, which is uncommon, but does happen.

Representative Luker asked if Mr. Grigg had seen the report from LSO that broke out the misdemeanor citations by city and type. Mr. Grigg replied that he had not and that he had requested that information from the courts, but had not received anything, which is why he sought information independently. Mr. Grigg stated he would like to see that data because it would be accurate data on every city, rather than those that have just reported. Representative Luker requested the data be sent to Mr. Grigg and advised the total is 4,539 and is broken down by city and misdemeanor type under the city codes.

Co-chair Bolz introduced Ian Thomson, Executive Director, Public Defense Commission. Mr. Thomson began by reviewing the proposed legislation. He stated the legislation would be characterized as housekeeping. The legislation covers the judicial appointment power of a judge to appoint an attorney, the compensation arrangements made in the event a judge appoints an attorney, the ability of counties to hire out-of-state candidates, which is specifically for institutional public defenders, and provides a term of service for the institutional defenders.

Mr. Thomson stated that, with regard to the judicial appointment power, the current statute allows counties to hire an institutional defender or joint public defender to represent their defendants or to contract with an attorney to represent those individuals who qualify for services. However, the current statute does not allow for judges to appoint an attorney if the institutional public defender's office or that contract attorney is conflicted on the case or unable to perform their duties. Mr. Thomson stated that the legislation changes the language to state that the court shall have the authority to appoint a substitute attorney only where there is a conflict or upon the request of the defending attorney. He noted that concerns were raised by some institutional attorneys about giving blanket authority to judges and allowing them to interfere in the public defender/client relationship. Mr. Thompson stated the legislation also restores language removed last year relating to how compensation is determined, should a judge appoint an attorney. The proposed legislation does not have specifics, but states the judge, at the time of appointment, needs to prescribe the compensation amount for that attorney. The legislation also orders the county to pay the prescribed amount.

Mr. Thomson stated the amendment to the legislation relating to the county's ability to hire out-of-state candidates applies to cases where the county has decided to create an institutional public defender. The current statute limits counties from selecting the best available candidate. The amendment states the appointed candidate must be licensed to practice law in Idaho at the time he or she takes office.

Mr. Thomson stated that the last proposed amendment is in the same section and addresses terms of service. He stated the current statute does not require a minimum term of service for the appointment of any institutional public defender, which essentially makes current county institutional public defenders at-will employees who can be dismissed at any time. Because there is no contract, the institutional public defenders are not contract attorneys but county employees, and there is no protection from a case-specific problem that may arise or difference of opinion on how litigation should be conducted. That person could be dismissed with a majority vote of the county

commission, thus permitting political interference. The Commission suggests the Committee consider a term of four years as a minimum which mirrors the statute under the State Appellate Public Defender. The State Appellate Public Defender is also appointed by the Governor for a term of four years. That position can be reappointed, but during the four-year term, the public defender can only be dismissed for good cause. Good cause, like all contracts, would be determined in courts, and the appropriate case law would apply as to what constitutes good cause. The county commission would still have authority or power to dismiss a public defender if there was an abuse or misuse of office or bad conduct. A term of service would insulate that attorney from political winds.

Senator McKenzie suggested including other situations where it is not on the request of the defending attorney, but where the court is required to impose substitute counsel in situations as stated under the professional conduct for lawyers. Mr. Thomson stated the Commission is reluctant to accommodate for the rules of professional conduct and believes discharge is covered under statute which requires that person be provided an attorney. He stated the rules of professional conduct could not be legislated, as they are not statutes or laws. It is a violation of separation of powers for the legislature to dictate the sole authority of the Supreme Court to determine the ethical practice of law. The preamble to the rules of professional ethics indicates rules of professional conduct are a self-enforcing set of rules. He stated that all attorneys are bound by those rules, and their license to practice hinges on the attorney's willingness and ability to comply with those rules, and that the attorney always complies, even in the absence of a judge's contrary order. Mr. Thompson stated that an exception, which invites a judge to make a determination whether an attorney is fit, is problematic. Senator McKenzie responded that it seemed the legislation picked out one situation and suggested it was something to contemplate.

Senator McKenzie suggested deleting "The attorney shall be compensated with regard to the complexity of the issues, the time involved, or other relevant considerations" and leave "reasonable rate of compensation" because many may want to give an hourly rate and not distinguish between a misdemeanor or felony case. He suggested stating "the reasonable rate of return for an attorney in our area is X per hour." Mr. Thomson responded that there was prudence in what Senator McKenzie suggested. He explained the language they chose was because it had previously been adopted. He stated that the idea of reasonableness is that the person is going to supposedly take into account all other appropriate considerations. Mr. Thomson did not have a problem with simplification.

Representative Trujillo stated that, with regard to compensation, the wording was removed because the Legislature considered it with flat rate contracts. She asked if problems would be created by allowing a judge to essentially create a flat fee. Mr. Thomson responded that there could be a problem if, upon appointment, a reasonable rate of compensation could be a flat fee, regardless of how much time the case would take. He stated that in light of other sections of the statute, he hoped that would not be the case. Mr. Thomson added that it would be difficult for the Commission to recommend a specific rate; however, adding "a reasonable hourly rate of compensation" would hem the judge from constructing compensation in another way. Representative Trujillo suggested the Commission consider the wording and possibilities of conflict regarding flat fee.

Representative Trujillo stated that a conflict is created if a term is placed where those counties that are contracting actually have the ability to look at this on a yearly basis, but those who have the public defenders are now tied into a four-year term. Representative Trujillo asked if that was regulated and if Mr. Thomson saw that as a problem. Mr. Thomson stated he would not call it a conflict, but disparate treatment. The Commission works on model contract terms and hopes to address those issues that would afford protections. Mr. Thomson stated that one of the concerns the Commission has in requiring a set length of term in a contract is the constitutional prohibition which would prohibit a sitting county commission from committing itself to a liability in the future to a yet unelected county commission. For example, a liability is created in the counties if the statute today requires a county commission to enter into a contract lasting four years when the county commission composition is going to be different by the end of that term. He stated

a model contract term should be shorter, perhaps two years. Mr. Thomson stated that hopefully that model contract terms are going to include those circumstances under which termination of the contract is appropriate or justifiable. A county employee is going to have certain protections under what circumstances that can be dismissed and should only be for good cause. Co-chair Bolz stated that what is being discussed is a four-year term only for those institutional offices which are inside the county, not the contracts themselves. Representative Trujillo responded that it creates a conflict between those counties that do contract out. Mr. Thomson stated that the nature of the relationship is such that there would be a difference in treatment, in pay, facilities provided, protections afforded, and benefits.

Representative Perry stated that a lot of the counties are starting to get their public defender houses in order and asked if Mr. Thomson would be opposed to making the legislation effective January 1 rather than July 1. Mr. Thomson agreed.

Co-chair Lakey noted concern with open amounts with regard to compensation. He suggested adding language tying it to the existing contract. Mr. Thomson agreed and stated there could be a problem compensating an attorney handling a multiple victim murder at the same rate as an attorney handling a misdemeanor. He stated it would be very difficult where an institutional public defender was involved because the rate would be unknown. Mr. Thomson stated that he could not say what the hourly rate would be for institutional public defenders. He stated that some larger counties had gone to institutional public defenders because of economies of scale, efficiencies, and cost savings. Co-chair Lakey clarified that he was suggesting having some type of list in advance or some type of balance versus a fairly open-ended reference in the statute. Co-chair Lakey stated he understood the need for independence with regard to the appointment process, but asked if the Commission considered adding transparency to the appointment process. Mr. Thomson responded that there was slight discussion. He stated that the Commission is aware there are no guidelines in counties and that there is some leeway in the current statute. He said the Commission had not made any recommendations at this time, but they were aware of it.

Senator Guthrie suggested adding "upon approval of the county commissioners" relating to the appointment and compensation. He stated that there is a judicial process to remedy an issue in a case with a public defender. Senator Guthrie asked if the court system or the county is liable if a case where a judge appoints "in the event of a conflict" goes wrong. Additionally, with regard to compensation without county commission approval, bills to counties can be high when there is a judge who is very liberal in appointing conflict counsel. Mr. Thomson stated that there is no financial remedy for the state's failure to provide adequate representation. He stated that some states have statutes for wrongful conviction making a state liable; however, for an inmate to sue the state or county for the failure to provide competent representation, neither the court nor the county is financially liable. Mr. Thomson clarified that the remedy for that individual is a new attorney and new trial. Senator Guthrie confirmed there is a cost. Mr. Thomson agreed and stated there is always a risk. Senator Guthrie stated the power is still being taken out of the hands of the county commission, and when a judge makes that appointment and it ends up being retried, there is a cost associated with it.

Senator Guthrie noted concern with regard to the four-year term; if at year end of the deal it does not work out, the county has to pay out the contract and the power of the county commission is compromised. Mr. Thomson responded that the county employee may not be due the four-year compensation if they were unable to show good cause, just as they would be for dismissing other county employees on a term. Ultimately, it is a restriction on the counties. The statute is contemplating tying hands in a limited way when it comes to interfering with a public defender who goes crossways, a year into the job.

Representative Luker asked why the compensation piece was put in Section 19-860 instead of 19-853. He noted that the judge's ability to appoint is restricted and that compensation should not

be in a different section, implying that they have a broader authority to appoint. It seems it should be together with Subsection 19-853(3) of 19-853. Mr. Thomson agreed; however, he suggested it be placed in Section 19-860 because that was where it came from and because of the title, "Compensation and appointment of public defender." If the Legislature corrected it, he agreed it would fit in Section 19-853. The only issue is the heading of Section 19-853 which talks about the duty to notify accused or detained of right of counsel. Some restructuring may be needed so people can find the relevant sections. Representative Luker suggested breaking down Section 19-853(3) into (a) and (b) and agreed the heading would need clarification.

Representative Luker noted concern about a court getting involved in a pre-existing conflict agreement. Mr. Thomson stated that the contract with the counties should circumvent that issue. He stated that the majority of the counties have conflict contracts with attorneys, and he hoped that those contracts would dictate which cases they would be appointed in, just as the primary contract would, but agreed it could be a gap in the legislation. Mr. Thomson stated that it could be considered that judges could circumvent existing conflict contracts, but wondered if that was a real problem. The statute states that the judge has the authority to appoint a substitute attorney, not indicating they must go with the conflict attorney.

Senator Mortimer expressed caution on all the proposed changes except for the ability of counties to hire out-of-state candidates. He had concern with the shift of power and ability in the proposed changes. Senator Mortimer said he would err on the side of the counties, particularly where it related to the ability to hold the purse. He noted concern with someone inflicting something on the counties when they have the ultimate responsibility and political responsibility to watch out for the will of the people. Senator Mortimer noted concern with the four-year appointment, which he considered a contract. He stated there is a difference between a contract and an employee and those are two separate issues which should be treated separately. There needs to be some ability to protect the employee, but that is inherent in an employee versus contract situation. Senator Mortimer recommended being very cautious in such a significant shift in ability in power. Mr. Thomson responded that he understood Senator Mortimer's concern; however, he believed that is the point of the interim committee and public defense reform, which is, things have to change and that means limiting county freedom in doing precisely what and when they want to do it. The legislation provides modest changes in that direction. Senator Mortimer agreed that small, incremental, step-by-step changes protecting the power of the people, county, and elected officials could be taken.

Representative Luker asked if the change from two to four-year term gave some independence to the public defender with more latitude to the county. He stated he would like to hear from the Association of Counties as to the best number of years. Representative Luker agreed with Senator Mortimer's comments; however, he believed the court authority is a benefit to the counties. It makes it clear what the judges can and cannot do in appointing counsel. He supported proceeding with that portion of the legislation.

Representative Trujillo stated it would be more expensive with the four-year appointment because every four years the counties would have to go through the process and employee negotiations. There are consequences to the legislation and questions whether the Legislature should be regulating to that extent for counties.

Mr. Thomson stated there are differences in interpretation of the recent statutory change to the single fixed fee. Many counties have asked which types of contracts are and are not permissible. Many counties are awaiting direction, where other counties have already taken a position and are interpreting the statute in many ways. Mr. Thomson provided two examples. First, the Seventh Judicial District operates on a yearly fixed flat fee contract, paying approximately \$4,400 per month to public defenders for all indigent cases. The District thought that when their contract expired, they could not enter into a similar contract going forward; therefore, the District entered into an hourly

rate contract with the exact same attorney. The District received their first monthly bill for the hourly rate, for that exact same attorney and doing the same work, in the amount of \$7,700. The second example is the Second Judicial District. Most counties in this District are under the impression that a county contract is not technically a fixed fee as long as that contract provides for the court to pay expenses and costs associated with the case above and beyond a monthly attorney's compensation. Those counties are under the impression they are going to continue to enter into contracts for a set amount of compensation over the course of the year that does not take into account either the time spent on the cases or the number of cases handled. Therefore, they do not consider it a fixed fee contract because those contracts allow for the courts to be paying associated expenses. Mr. Thomson stated that he hopes to address these differences in interpretations in their model contract terms.

Representative Luker asked which view the Commission agreed with. Mr. Thomson stated the Commission had not met and did not have a position. He stated that his interpretation was that if a contract was entered into with an attorney for a set amount of money, it did not account for caseload, case caps, or an out for extraordinary cases; it is a flat fee contract that violates statute because it is not accounting for eventualities. Representative Luker stated the difference in the amount is significant and the real issue in a flat fee is that there is not a dedicated public defender. He stated the objective ought to be to have dedicated public defenders either through contract or a public defender office. Representative Luker asked if that had been discussed by the Commission. Mr. Thomson agreed and added that the public defender in the Second Judicial District (Fremont County) handled 293 felony case equivalents where for a single attorney, the goal is 150; therefore, the increase of almost 70% is not surprising and is the state of some of the smaller counties.

Senator McKenzie agreed with Mr. Thomson in that you cannot have a flat fee contract and not consider caseloads. He stated that the duty of the state is to provide what is minimally required under the constitution for public defense and that includes looking at caseloads and other factors. Senator McKenzie stated the model contracts need to outline those considerations; otherwise, it leaves those counties open for lawsuits if those caseloads are disproportionately high and it does not solve anything by saying that expenses and costs can be tacked on at the end.

Co-chair Lakey asked if the model contract provisions are in the middle and if the committee is contemplating a no-fixed fee and not a purely hourly contract. Mr. Thomson stated the commission is currently negotiating the model contract terms and could not comment, but that it needs to be considered.

Mr. Thomson stated that the numbers received from LSO are based on self-selecting surveys without mandatory participation. LSO received 11 responses from 46 contract attorneys. Mr. Thomson counted 150 attorneys. Partial participation requires LSO to impute data to non-participating counties, which is a problem. The LSO numbers included a number of assumptions, including the percentage of cases being handled by appointed attorneys and more importantly the percentage of cases handled by conflict appointed attorneys. Mr. Thomson stated that the survey information on expenses does not explain what those numbers represent. It is uncertain if the indigent services numbers reported by county clerks include conflict cases, other case expenses, whether case costs are handled by the institutional defenders or contract attorneys versus conflict attorneys. Some institutional defenders are paying conflict attorneys out of their own budgets. He stated the LSO numbers may attempt to address needs for additional attorneys, but it does not address the underpayment of attorneys and inadequacy of resources including training, software, overhead, and support services. Not only do you have to account for case overload, but also underpayment. Mr. Thomson determined attorneys are being paid \$75 per hour and did not believe \$75 was adequate to run an office. He noted that the federal indigent services defense compensates their indigent appointed defense attorneys at \$126 per hour and the \$75 per hour rate was allowed to pay a second chair defense attorney in their very first year of law school. Mr. Thomson stated that if Idaho attorneys worked at \$125 per hour, using the computation that LSO did, the system would sink. Mr. Thomson stated there is a discrepancy in the numbers LSO came up with from the survey;

therefore, he is unable to determine if a county needs to increase or decrease their spending and unable to give meaningful guidance to the Legislature. To do that, reporting needs to be good and mandatory. Current statutes do not require compliance. Section 19-864(2) requires basic reporting to county commissioners only. Mr. Thomson stated the commission wants uniform reporting requirements as a condition for employment; however, the attorneys want compensation for tracking their numbers. He stated that once clear data is collected from the counties, the commission will be able to give the Legislature an accurate assessment of the cost of adequately funding indigent defense throughout the state. Mr. Thomson stated that in his assessment, using the numbers provided by LSO and based workload and underpayment, a \$14,486,000 increase would be needed to get workload down to 150 felony cases at \$75 per hour.

Representative Luker stated that cost of data collection is an appropriate expense of the state, not the county, and if reporting is required, an approximate cost would be needed. Mr. Thomson clarified that case management software could be expensive whereas manpower may be better. Co-chair Bolz agreed the data is inadequate; however, something needs to be done with the defense system. Sara Thomas, State Appellate Public Defender, stated that the courts are implementing the Odyssey system, which is less expensive. She stated that once implemented, all public defenders in Idaho will have free access to the case management system and free reporting. The only cost is a small fee for hosting the data and the initial setup and training. Therefore, there will be a mechanism for free reporting, it just may take some time. Senator McKenzie asked Mr. Thomson to clarify if the commission was making a recommendation for required reporting directly to the commission and what is the minimum amount of data needed. Mr. Thomson stated that it's currently being discussed.

The committee recessed at 10:12 and reconvened at 10:30.

Co-chair Bolz opened the floor for discussion of draft legislation on the city public defense and the reclassification of misdemeanors to infractions.

Representative Luker stated that he had reviewed proposals of legislation to migrate misdemeanors to infractions. The first proposal dealt with Fish and Game violations and places a \$250 fine. The second proposal deals with driver's license violations being punishable by fines not to exceed \$300. The third proposal covers alcohol and tobacco violations involving minors. The fourth proposal separates types of litter and debris: paper and larger and/or dangerous objects; i.e., refrigerators or fireworks. The fifth proposal relates to curfew. The sixth proposal repeals some provisions. Co-chair Bolz asked Dan Chadwick, Executive Director, Idaho Association of Counties, if he had any comments regarding the proposals. Mr. Chadwick stated that the proposals were consistent with recommendations from the reclassification subcommittee. He noted that the Fish and Game proposal looked more extensive than expected but incorporated all their recommendations. The committee discussed the language regarding the fines.

Senator McKenzie suggested clarifying the difference between infraction and misdemeanor with regard to minors involved in alcohol/tobacco infractions and losing their driver's license. Co-chair Lakey asked if law enforcement was involved in the proposed repeals. Mr. Chadwick confirmed those proposals were at the request of Idaho State Police and sheriffs.

Co-chair Bolz thanked Representative Luker, Mr. Chadwick, and the subcommittee for their work on the proposals. Senator McKenzie made a motion that the committee move forward on the proposals, but suggested revising the proposal regarding minor-involved alcohol/tobacco infractions to state that the first time would be an infraction. The second time would be a misdemeanor with the jurisdiction of the juvenile court system and attach the driver's license penalty. Senator Buckner-Webb agreed with Senator McKenzie's recommended revision. Senator Guthrie supported the motion but suggested all Fish and Game fines be \$250. Representative Luker stated the difference was that some were infractions versus misdemeanors. The motion was seconded by Senator Bucker-Webb. The motion passed unanimously by voice vote.

Representative Luker stated the proposed legislation regarding public defense by cities was not a major revenue issue, but a philosophical issue. The legislation did not require the cities to set up a police department, but rather contract with the police. Co-chair Bolz opened the floor to the committee to discuss what the system should look like in Idaho, how it should be funded, and who would be in charge, the state or county, and would it be a bifurcated system as is currently set up. He asked if there should be an appropriation for public defense in Idaho, even though the data is not accurate. Co-chair Bolz asked the committee to consider the resolution from the counties. Representative Trujillo stated there needed to be some local control and if a system was utilized, a regional system would be more appropriate than a statewide system. Co-chair Bolz asked Mr. Chadwick to explain the additional expenses some counties had due to changes. Mr. Chadwick referenced Mr. Thomson's example of the discrepancies in hourly rate versus flat fee and added that access to data would help see where the changes in yearly rates were coming from. Co-chair Bolz confirmed that making recommendations was difficult without data.

Mr. Chadwick stated that with regard to local control, the public defense system is a state responsibility and added that the board of county commissioners has little authority. He agreed, however, with having a regional system. Senator Mortimer stated the responsibility should be with the county, but the state could help. Mr. Chadwick agreed, but the board of county commissioners' hands are tied because the issue is a U.S. 6th amendment right and should be a state responsibility. Co-chair Bolz stated a system would undoubtedly cost more, but how much more was unknown. Mr. Chadwick stated if the county had the responsibility, they would need to have the tools to do so. Representative Perry asked Mr. Chadwick to explain the resources and tools needed besides funding. Mr. Chadwick stated that contract terms, model contracts, and access to data were the types of tools needed, which also would incur costs.

Representative Luker noted concern with the full flexibility of the county to run the prosecution side of things and saddling the state with the obligation to chase after them; he suggested considering multi-county cooperative agreements. Representative Luker suggested identifying deficiencies and determining associated costs and whether those costs are county or state costs. Co-chair Lakey agreed that the responsibility lies with the state; however, he said he thought they would be better managed at the local level. The real issue was funding, which could be addressed once the data was available.

Representative Luker asked if there should be a continuation of the committee. Senator McKenzie stated the committee still needs to flesh out local control, state level constitutional standards, statewide reporting, and statewide funding assistance. Co-chair Bolz noted a quandary exists when there are counties with in-house public defender systems being funded by the county versus counties who have contracts. He asked how to differentiate if the state contributes. Co-chair Bolz stated the committee needs to consider if and how the state should pick up inherent new costs. Representative Luker stated it would be difficult to attach a cost to increasing standards, but could be easily addressed through training which is already in place. He stated there is a cost to increasing standards, but he was not sure how to do that and agreed the committee should continue.

Ms. Thomas asked the committee to consider that many aspects of the legislation are outside the public defense commission's statutory authority. Co-chair Bolz stated it should be up to the committee, not the commission, to bring that to the Legislature.

Senator Guthrie believed the state should have a financial presence and recommended the committee focus on what that presence would look like. Co-chair Bolz stated the committee should continue until the data is available and a cost could be determined.

Senator Mortimer stated cooperation from the PDC and continuation of the committee was needed to obtain data and estimated costs from LSO. Senator Mortimer motioned to continue this committee next year. The motion was seconded by Representative Luker. The motion passed unanimously by voice vote.

Senator Guthrie asked Mr. Chadwick if Justice Fund levy limits could be raised and if raising the cap would help. Mr. Chadwick responded that some counties did not have the ability to raise revenue, and it depends on the county. He stated that levy caps need to be on the table. Representative Trujillo stated that she believed raising the cap rate was not a viable solution.

Representative Luker noted the committee still needed to act on the Commission's proposal regarding office terms and asked Mr. Chadwick to clarify a few points from the proposal. Mr. Chadwick stated that judge appointments must be in statute and that the language addressing pay was weak. Statute needs to state that judges cannot arbitrarily determine the cost. Mr. Chadwick suggested "not less than two; no more than four" language to address the terms of office issue. However, management of the public defender becomes problematic. He noted that having terms takes the politics out of appointments; however, the counties' hands will be tied if someone is not playing well. Representative Luker asked if there would be a benefit to setting a minimum term "at will," after a probationary period. Mr. Chadwick stated that could be a benefit. He added that it would not matter with 2-4 years; the question is "at will" as it relates to performance as a county department head and then "for cause" as it relates to performance as an attorney or public defender. Mr. Chadwick stated statutory language may need to be added to distinguish the two.

Senator McKenzie stated that specifying a term may not be necessary and that he supported the good cause standard in breach of the contract terms as the conditions for terminating early.

Co-chair Bolz asked Mr. Thomson if the proposal was for a committee recommendation or information purposes only. Mr. Thomson stated the commission hoped the interim committee would endorse the proposal and take it to the Legislature.

Representative Trujillo agreed with the proposal and adding Mr. Chadwick's recommendation of barring judges from arbitrarily determining costs. She also suggested striking language setting a specific term. Representative Luker stated that there were benefits to setting a specific term but suggested breaking the proposal into separate pieces of legislation. Representative Luker supported moving the bill forward with the understanding that the provision in Subsection 3 in Section 19-860 be moved to Section 19-853, that the limitations portion be fleshed out and including a two-year term to give the public defender some independence.

Senator Guthrie stated he could not support the proposal because it would give judges too much latitude to set compensation, to what end. Additionally, it would take power from the county commissioners. Senator Guthrie stated he also could not support setting a term, but suggested a probationary period. Co-chair Lakey supported putting the ability to appoint back in statute; however, he did not support moving forward with setting terms and with adding good cause.

Representative Luker stated that the appointment issue; Section 19-853, Subsection 3 preserves authority in the county by reducing judicial discretion; courts can only appoint in area of conflict. However, judges could still set compensation rates without guidance. Representative Luker agreed there should be more, but something would be better than nothing. Co-chair Lakey agreed with placing more restrictions on appointments; however, he said more time was needed and did not support moving forward.

Senator Mortimer motioned to adjourn the committee. There was no second. The motion passed unanimously by voice vote.

Co-chair Bolz expressed his appreciation for the committee's two years of work. He thanked LSO staff members, as well as audience members, for their participation and presentations.

Co-chair Bolz adjourned the meeting at 11:53 a.m.